92-478

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

ARIZONA HISPANIC COMMUNITY FORUM,

Appellant,

v.

J. FIFE SYMINGTON, et al.,

Appellees.

Appeal From The United States District Court For The District Of Arizona

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the district court erred in finding exigent circumstances, in ordering into effect on an interim basis a legislative plan for redistricting that had been objected to by the Department of Justice, was not submitted for preclearance review prior to implementation and was subsequently the subject of a second objection by the Department of Justice, and by waiving section 5 preclearance of the plan before implementation.

LISTING OF ADDITIONAL PARTIES

APPELLANTS

Arizona Hispanic Community Forum

APPELLEES

Arizonans for Fair Representation, Inc.,
Paul Fannin,
John Mawhinney,
Stan Turley,
Hispanic Chamber of Commerce, Inc.,
Edward Valenzuela,
Richard Zazueta,
Valerie Ann Vidal,

The **San Carlos Apache Tribe,** a Federally Recognized Indian Tribe, and **Raleigh Thompson,** Chairman, and **Burnette Rope,** Vice Chairman, and as Individual Tribal Members, **Vernon Masayesva,** Chairman, **Loris Minkler** and **Wayne Taylor, Jr.,** Individual Tribal Members of the **Hopi Indian Tribe,** a Federally Recognized Indian Tribe **The Tonto Apache Tribe,** a Federally Recognized Indian Tribe, **Louise C. Lopez,** Chairman **Jeri Johnson,** Vice Chairman, and as Individual Tribal Members, **Yavapai-Apache Indian Community, Camp Verde Reservation, David Kwail,** Chairman, **Stanley Jackson,** Vice Chairman, and as Individual Tribal Members, **The Havasupal Tribe,** a Federally Recognized Indian Tribe, **Don Watahomigie,** Chairman, **Thomas Siyuja, Sr.,** Vice Chairman, and as Individual Tribal Members, **The Cocopah Indian Tribe,** a Federally Recognized Indian Tribe, **Pete Sotos, Individual Tribal Members**

LISTING OF ADDITIONAL PARTIES–Continued

J. Fife Symington, Governor of the State of Arizona

Richard D. Mahoney, Secretary of State of the State of Arizona

Arizona State House of Representatives

Arizona State Senate

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OPINIONS BELOW

The June 19, 1992, Memorandum of Decision and Order of the three judge court has not yet been officially reported. It was filed in the United States District Court for the District of Arizona in case number 92-256-PHX-SMM, and is set out in the accompanying Appendix at App. 1a.

JURISDICTION

The Order appealed from was filed June 19, 1992. Notice of Appeal to this court was filed on July 15, 1992. App. 11a. An Amended Notice was filed on July 20, 1992. App. 15a.

This court has jurisdiction under 28 U.S.C. § 1253.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The principal statutory and constitutional provision involved in this case is Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

Section 5 of the Voting Rights Act provides, in pertinent part:

> "[W]henever a State . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . such State or subdivision may institute an action in the United States District Court for the District of

> Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title. . . . Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made."

STATEMENT OF THE CASE

The State of Arizona experienced a significant population growth over the decade of the 1980's. The combined minority population of Arizona grew from 25.4% of the total population in 1980 to 28.9% in 1990. All minority populations grew at rates faster than the non-minority population. The Hispanic population alone experienced a 52% increase, and rose from 16% of the total population in 1980 to 19% in 1990. As a result of the tremendous population growth, the existing Arizona election districts for state and congressional offices were malapportioned. The Arizona state legislature undertook the process of

redistricting legislative and congressional election districts during the 1992 legislative sessions.

In the state of Arizona, one set of election district boundaries is utilized for the election of members of both state legislative houses. One senator and two House of Representative members are elected from each election district. In effect the state utilizes single member districts for the election of the state Senate and multi-member or dual member districts for the election of members to the state House of Representatives.

Of the thirty (30) members of the state Senate, five (5), or 16.67%, are Hispanic. Of the sixty (60) members of the state House, only six (6), or 10%, are Hispanic. As a result of the 1992 redistricting, at least one incumbent Hispanic state senator is not seeking reelection because of the changes in his district, reducing the Hispanic membership of the Senate to 13.33%.

This action was commenced by a non-profit group, Arizonans for Fair Redistricting, and three non-minority voters of Arizona on February 7, 1992, during the course of the legislative session and prior to any redistricting plan being adopted by the legislature. App. 1a.[1] Their complaint asked the district court to accomplish Arizona's legislative and congressional redistricting due to an asserted deadlock between the two houses of the bicameral legislature over the issue of redistricting during the session. *Id.*

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[1] Reference to the Appendix shall be noted as App. ___a.

On March 3, 1992, the district court issued a pre-trial order setting the schedule and regulating activity in the litigation setting the hearing on congressional redistricting plans submitted by parties to begin April 13, 1992. The court stayed further action on the legislative portion of the redistricting litigation because of representations by the state defendants that the legislature had passed a legislative redistricting plan that was signed by the governor on or about February 20, 1992. *Id.* That plan, Laws 1992 (5th Special Session) Chapter 1, HB 2002, (HB 2002), was subsequently sent to the Department of Justice for preclearance review under Section 5 of the Voting Rights Act. *Id.*

The court realigned two state defendants, the governor and the state House, as plaintiffs with the Arizonans for Fair Representation. The court allowed the intervention as plaintiffs of several minority parties, including Hispanics, Native Americans and Congressman Ed Pastor.

On June 10, 1992, the Department of Justice issued a letter of objection to the legislative redistricting plan, HB 2002, informing the state that the plan could not be legally enforced for the election of state senate and house of representatives members.[2] App. 21-5a. The letter cited the division of the Hispanic population in Santa Cruz County among three legislative districts and the accompanying failure of the state to create an additional district in that southeastern area of the state in which Hispanics

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[2] The Department of Justice's letter of objection dated June 10, 1992, is contained in the Appendix at App. 21a, and the second letter dated August 12, 1992, is contained in the Appendix at App. 26a.

voters would have the potential to elect representatives of their choice. App. 23a. Further, the letter found that the legislative plan's flaws were the result of the state's interest in protecting white incumbents at the expense of minority voters, thus minimizing minority voting strengths. *Id.*

On June 10, 1992, the Arizonans for Fair Representation filed a Motion for Temporary Lifting of Stay and For Emergency Interim Legislative Plan, requesting the district court order the emergency use of HB 2002, modified to correct the deficiency in Santa Cruz County cited by the Department of Justice in its letter of objection. App. 2a.

The district court scheduled a hearing on June 17, 1992, on the plaintiffs' motion. *Id.* Over the course of the intervening six days, the Arizona legislature set and held public hearings on the legislative redistricting plan. On June 16, 1992, the Arizona legislature adopted a new plan for redistricting (S.B. 1360) that was signed into law on June 16, 1992, by the governor. *Id.* That plan resulted in the move of only four precincts between two districts in the southern part of the state, increasing the Hispanic population in district 8 from 34.7% Hispanic population to 37.4% Hispanic population while reducing the Hispanic population in district 9 from 16% to 13%. App. 27a. No other changes were made to the plan, HB 2002, that had been objected to by the Department of Justice. *Id.*

The state Senate and House and the Arizonans plaintiffs filed a stipulation with the court on June 17, 1992, agreeing to the implementation of S.B. 1360 for the 1992 elections. In the June 17, 1992, hearing on oral argument, Hispanic plaintiffs opposed the stipulation and request

by Arizonans and the state, because of the failure of the plan to fully address the Section 5 objections to HB 2002 and the proposed circumvention of the preclearance process. Hispanic plaintiffs urged the court to delay issuance of any order while the state sought Section 5 preclearance of S.B. 1360, or to order the state to immediately seek preclearance of the plan. App. 6a.

The district court issued its Memorandum of Decision and Order on June 19, 1992. App. 1a. The court's June 19 order granted the motion for temporary lifting of the stay in the legislative case and the motion for emergency interim use of S.B. 1360 for 1992 elections with state legislators ordered to serve their full two year terms. App. 8a. The court also authorized the use of all precinct and polling place changes, on an interim basis, as necessary for the implementation of S.B. 1360. *Id.* Finally, the court ordered emergency interim use of Laws 1992, Fifth Special Session, Chapter 2, that had otherwise not received preclearance or been previously ordered into effect for 1992 elections by the court. *Id.*[3] In the context of its order, the court provided that the state should submit S.B. 1360 to the Department of Justice by July 31, 1992, 42 days after the order, for use of the plan in future elections. App. 9a.

On August 12, 1992, some twenty days after the state's July 23, 1992, submission of the legislative plan to the Department of Justice, the Department of Justice interposed an objection to S.B. 1360, and informed the

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[3] In its previous order of May 5, 1992, ordering a congressional plan into effect for the state of Arizona, the district court had authorized the use of Chapter 2 without preclearance to facilitate 1992 elections under the plan it had adopted.

state that the 1992 redistricting plan for the Senate and House of Representatives continued to be unenforceable. App. 26a. The letter again cited the state's failure to create another district in southern Arizona that was majority minority, and the state's continued elevation of incumbency-protection above fair recognition of minority voting strength as the reasons for the objection. App. 27-8a.

Hispanic plaintiffs filed an emergency motion for an injunction on August 19, 1992, after it became clear that the state was not responding to the letter of objection. The district court has refused to set a hearing on the matter despite repeated requests and inquiries, and denied the motion on September 9, 1992, stating it lacked jurisdiction because of this appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION

For the second time in as many months, the district court below has ordered a redistricting plan for the state of Arizona that circumvents Section 5 of the Voting Rights Act, ignores minority voting rights, and threatens to undermine the enforcement of the Voting Rights Act in Arizona and throughout the south and southwest. In the first case, on May 5, 1992, the district court below, using erroneous criteria, ordered into effect a permanent plan for election of Arizona's congressmen, without any finding of exigent circumstances, without applying Section 5 mandates in its remedy, and circumventing Section 5 preclearance review requirements for that election plan. That order has been appealed by Hispanic voters, and is currently before this Court. *Hispanic Chamber of Commerce*

v. Arizonans for Fair Representation, Nos. 92-362 and 92-375 (U.S. Aug. 27, 1992).

In the instant case, following a Section 5 objection to Arizona's original plan, on June 19, 1992, the district court ordered into effect as an "interim" plan a newly legislated redistricting plan that failed to address Section 5 objections interposed to the previous plan and ordered its use for 1992 elections of Arizona Senate and House of Representative members because of exigent circumstances. The court also waived Section 5 preclearance requirements for the redistricting plan's use in 1992.

To date, the state of Arizona has managed to circumvent Section 5 preclearance requirements and the mandates of Congress and this Court under Section 5 of the Voting Rights Act for all its statewide redistricting plans. With the help of the district court, the state of Arizona has thumbed its nose at the Voting Rights Act and the important protections afforded minority voters under that Act for this election year, and probably all subsequent election years in this decade. The potential for the rulings in this case to infect other jurisdictions is great.

II. THE DISTRICT COURT ERRED BY FINDING EXIGENT CIRCUMSTANCES, BY ORDERING INTO EFFECT, ON AN INTERIM BASIS, A LEGISLATIVE PLAN FOR REDISTRICTING THAT HAD BEEN OBJECTED TO BY THE DEPARTMENT OF JUSTICE, WAS NOT SUBMITTED FOR PRECLEARANCE REVIEW PRIOR TO IMPLEMENTATION, AND WAS SUBSEQUENTLY THE SUBJECT OF A SECOND OBJECTION BY THE DEPARTMENT OF JUSTICE, AND BY WAIVING SECTION 5 PRECLEARANCE OF THE PLAN BEFORE IMPLEMENTATION FOR 1992 ELECTIONS.

The district court below ordered the legislative plan into effect because it was appropriate. App. 2a. Citing upcoming elections and the "complicated administrative procedures" in Arizona's electoral process, the court determined that exigent circumstances existed which justified the interim use of newly enacted S.B. 1360, without preclearance. *Id.* The court determined generally and without specificity or factual explanation that the upcoming deadlines and the need to avoid further delays which might lead to voter confusion or disenfranchisement required the court to choose the interim use of S.B. 1360, waiving preclearance. App. 24a.

The district court noted and rejected several remedial options including: 1) the conduct of elections under the 1982 legislative plan, 2) the delay of state legislative elections with the holding over of incumbents, and 3) the conduct of elections on an at-large basis for all 60 legislators. App. 4-5a.

The court did not consider as an option the moving of some election law deadlines to allow the state to seek

preclearance review of S.B. 1360, despite the facts that the state's filing period for candidates was still open and primary elections remained almost three months away, with the general election five months away.[4] Nor did the court consider ordering its own plan or a modified party plan into effect, with corrections of Section 5 violations, as a court ordered plan, thus exempting the plan from Section 5 preclearance requirements.

The court simply selected the plan presented through the state's stipulation in the June 17, 1992, proceeding, the newly enacted legislation, S.B. 1360, despite the failure of that plan to remedy Section 5 objections. The court did not invite any alternative plans or suggestions from other parties and did not attempt to make its own changes to the legislated plan. The court disregarded complaints that the plan failed to address the Department of Justice's objections, and then ordered Section 5 preclearance requirements for that legislated plan waived for 1992 elections. App. 6-9a. In complete contravention of *McDaniel v. Sanchez*, the district court facilitated the state's goal of avoiding more than the least possible change to its incumbent driven plan and the obstacle of Section 5 review, because the state never intended to respond to the Department of Justice's objections.

Even with the district court's imprimatur, the state's plan could not qualify as a "court decree" exception to the requirement of Section 5 preclearance before implementation.

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[4] The primary elections for the state of Arizona were conducted on September 8, 1992. The general elections are scheduled for November 3, 1992.

> "The one exception where Section 5 review would not ordinarily be available is where the court, because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant. This is the limited meaning of the 'court decree' exception recognized in *Connor v. Johnson*, 402 U.S. 690 [91 S.Ct. 1760, 29 L.Ed. 2d 268] (1971) . . . Furthermore, in fashioning the plan the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." Senate Report, at 18-19.

McDaniel v. Sanchez, 452 U.S. 130, 149 (1981) (*McDaniel*).

Although allowing district courts the power to fashion interim remedies in voting rights cases, this Court has specifically determined that Congress mandated all proposals reflecting the policy choices of the elected body, no matter the constraints in choice, must meet preclearance requirements of the Voting Rights Act. *McDaniel*, 452 U.S. at 153. Regardless of the latitude given district courts in fashioning remedies, this Court has continued to require that the Congressional mandates of Section 5 remain inviolable and the one clear constraint of the remedial powers of a district court. *Clark v. Roemer*, 500 U.S. ___, 111 S.Ct. 2096, 2105 (1991) (*Clark*). Section 5 preclearance is required, even when a federal court orders a state's election plan into effect. *McDaniel, supra.*

The district court below did not follow the clear mandates of this Court and Congress when it determined to order the legislated redistricting plan, S.B. 1360, into effect for elections without preclearance. The Arizona legislature responded to the Department of Justice's June

10, 1992, letter of objection to its legislative plan by only moving four precincts between two districts to "eliminate" the three way division of the Santa Cruz County Hispanic population. However, the plan produced by the Arizona legislature completely disregarded the Department of Justice's conjunctive and substantive objection to the state's failure to create an additional district with the population in that southern part of the state where Hispanic voters would have potential to elect representatives of their choice, because of the state's interest in protecting incumbent legislators. App. 27-8a.

Because the court found that S.B. 1360 reflected "the state's policy" and attempted "to cure the objections raised by the Department of Justice," the court found it had authority to order the interim use of the legislated plan for elections without preclearance because of "exigent" circumstances. App. 6a. The court ignored the fact that the legislative plan not only failed to cure the Section 5 objections, but actually continued the significant discriminatory feature of servicing white incumbents at the expense of minority voters and representation.

The court apparently erroneously determined that it had the power to order the legislated plan's use without compliance with Section 5 because it only ordered the plan for "interim" use. App. 2-3a. The court also mistakenly determined that its obligation to defer to legislative intent in redistricting in this instance required the court to order the use of the infirm legislative plan as a "remedial" plan, despite its failure to respond to the Section 5 violations found by the Department of Justice. App. 5-6a. Finally, the court, in contravention of almost thirty years of legal precedent, determined the *legislated*

plan should be ordered into effect for immediate implementation *without* Section 5 preclearance because of a fabricated emergency of elections in three and five months, and the court's refusal to delay any election deadlines. App. 3-4a and 9a.[5]

The district court totally misconstrued this Court's determination in *Upham v. Seamon*, 456 U.S. 37 (1982), (*Upham*) that elections may be conducted under apportionment plans "that do not in all respects measure up to the legal requirements, even constitutional requirements," to include the conduct of elections under plans that contain Section 5 violations or have not otherwise met Section 5 preclearance requirements. *Upham*, 456 U.S. at 43. In fact, this Court approved the lower court's efforts in *Upham* remedying the Section 5 violations in the apportionment plan. The infirmities in the apportionment plan addressed by this Court in *Upham* were not Section 5 violations, but were error resulting from additional changes made by the court where there were no constitutional or statutory violations found. Section 5 violations were remedied by the district court before this Court allowed that elections might go forward under the district court's plan, despite other legal concerns.[6]

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[5] Exigent circumstances have previously been determined to exist when the candidate filing period has passed and/or been postponed and passed, and elections are literally underway or within weeks or days of commencing. *Upham v. Seamon*, 456 U.S. 37 (1982); *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982). This was not the case in Arizona.

[6] The district court also erroneously relied on *Terrazas v. Clements*, 537 F.Supp. 514 (N.D. Tex. 1982), as authority for its order that elections be held under an unprecleared legislative

Moreover, the admonishments of this Court in *Connor v. Finch*, 431 U.S. 407 (1977), that an interim remedial

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redistricting plan, that incorporates Section 5 violations, because of the "emergency" in the state electoral process. In *Terrazas*, the district court was faced with a primary election in seven weeks, had already extended the deadlines for filing of candidates, and those extended filing deadlines had passed. The court was also faced with remedying two separate legislative redistricting plans, one for the Senate with 31 districts and another for the House with 150 districts. Nonetheless, the district court held a full evidentiary hearing at which all parties were offered the opportunity to present plans and evidence. The hearing extended over several days, with presentation of witnesses and hundreds of exhibits, including complex statistical evidence on plans, voter behavior, and voter registration. The Department of Justice was invited to participate in an amicus curiae capacity. The court carefully analyzed all plans submitted for the four major metropolitan counties where the Department of Justice had interposed objections. The court adopted party plans for two counties that the court determined remedied the Section 5 objections. For the other two counties, the court specifically reviewed the potential for increase in minority representation under all party plans versus the state's plan, as well as the significant changes in election district and voting precinct boundaries occasioned by the implementation of another party's plan in the forty plus districts of those counties. The court determined to allow elections to proceed under the unprecleared portions of the state's plans in only those two counties. The Department of Justice subsequently withdrew objections to some areas. The district court's decision was not appealed.

In the instant case, the candidate filing period was still underway. The court refused to consider extending filing deadlines or any other election law deadlines. Primary elections were three months away, and general elections five months away. There was one legislative plan under consideration that contained only thirty districts. The court did not conduct an evidentiary hearing or allow for submission of other plans. A

reapportionment plan must reconcile the requirements of the Constitution with the goals of state political policy was directed to the limitations of a district court's equitable powers. This Court prohibited district courts from going beyond the remedy of found constitutional or statutory violations to the replacement of otherwise legitimate state policy. This Court *did not* determine that a court should defer to state policy in lieu of remedying illegalities found in a reapportionment plan.

While a district court cannot go beyond the violations found in a reapportionment plan in fashioning a remedy and must defer to state policy where no violations are found, a district court *must* exercise its remedial powers to address those violations. *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). The exercise of that remedial power *must* implement "the mandate of Section 5 in the most equitable and practicable manner with the least offense to its provisions." *Clark*, 500 U.S. ___, 111 S.Ct. at 2105.

Clearly, the remedial powers of an equity court do not include the actions taken by the district court below of ordering into effect a legislated plan that contains features found to be discriminatory with regard to minority voters under Section 5, and waiving the preclearance requirements for that unenforceable plan, particularly when elections are months away. The district court failed to exercise its equitable powers to remedy the Section 5 violations in Arizona's legislated plan. The court took no

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second letter of objection has issued to the plan that was adopted by the court. This case is being appealed.

evidence and weighed no equities, but determined an emergency existed. Then the court proceeded to completely offend the mandates of Section 5 by ordering the state's infirm plan into effect without Section 5 review.

Section 5 of the Voting Rights Act has been considered by this Court of such significance as a public policy and importance as a tool in the eradication of racial and ethnic discrimination in voting that it has consistently and vigorously enforced the provisions of the Act since its inception. *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 121 (1978) (*Sheffield*). Over the thirty years of the Act's existence, this Court has refused to allow the erosion or the compromise of the Section 5 mandates intended by Congress.

To prevent circumvention of constitutional policy of this country, Congress adopted Section 5 under which a covered jurisdiction's election procedures are frozen until it affirmatively demonstrates to a federal instrumentality that the desired change to those procedures will not discriminate against minority voters. *Sheffield*, 435 U.S. at 121. "[T]he advantage of time and inertia are shifted from the perpetrators of the evil to its victims," under Section 5. *Id.* Accordingly, under Section 5 of the Voting Rights Act, this Court has determined that the effect of an objection by the Department of Justice, when there is no declaratory judgment from the United States District Court for the District of Columbia, is to preclude the jurisdiction from holding elections. *Holt v. City of Richmond*, 406 U.S. 903, 903 (1972). (*Holt*) No new voting practices or procedures or changes to voting practices or procedures may be enforced unless "the State or political

subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object." *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645 (1977). Unprecleared changes "are not now and will not be effective as law until and unless precleared pursuant to Section 5." *Connor v. Waller*, 421 U.S. 656, 656 (1975)

This Court and individual Justices have held that elections should not go forward pursuant to unprecleared voting changes, and have granted injunctions to prevent such elections. *See, e.g., Lucas v. Townsend*, 486 U.S. 1301 (1988); *Canady v. Lumberton County Board of Education*, 454 U.S. 957 (1981); *Holt*, 406 U.S. at 903.

The Court has repeatedly reversed three-judge courts that have failed to properly apply or to comply with the mandates of Section 5 of the Voting Rights Act. *See, e.g., NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985); *McCain v. Lybrand*, 465 U.S. 236 (1984); *Blanding v. DuBose*, 454 U.S. 393 (1982); *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977); *Connor v. Waller*, 421 U.S. 656 (1975).

The U.S. Attorney General objected to Arizona's legislative redistricting plan, HB 2002. The legislature enacted a "new" redistricting plan (S.B. 1360) that made minimal, cosmetic changes in response to the Department of Justice's objections, but did nothing to cure the Section 5 objection to the state's failure to create a majority minority district in southern Arizona because of its interest in protecting white incumbents. The district court did not cure the Section 5 objections when it ordered the new

legislated plan into effect for 1992 elections. Moreover, the court, against this Court's mandates, ordered the 1992 elections be conducted under S.B. 1360 without compliance with Section 5 preclearance requirements and without a true emergency.

The Arizona legislature did not address minority voting rights the first *or* the second time it acted on legislative redistricting. The district court below, for the second time in this round of Arizona redistricting, ignored minority voting rights and aided the state's circumvention of Section 5 of the Voting Rights Act.

If the Arizona legislature does not act to redistrict within the decade, the district court's ordered plan which is now the subject of a second letter of objection, if allowed by this Court to stand, will remain in effect. From what has transpired in the state to date, it is clear that inaction (or ineffective action) for the Arizona legislature (as with most other legislatures) is easier to accomplish than action. Incumbent protection concerns will be as strong tomorrow as they are today. Thus, the state of Arizona will be able to circumvent Section 5 mandates and minority voting rights concerns in its legislative election plan for the duration of the decade. In fact, to date, the state of Arizona has managed to completely disregard Section 5 and minority voting rights in all its redistricting activity.

CONCLUSION

THE DISTRICT COURT ERRED AND THE DECISION BELOW MUST BE REVERSED.

What has occurred with regard to Arizona's legislative redistricting, like what occurred with the state's congressional redistricting, will become a blueprint for jurisdictions throughout the south and southwest, seeking to circumvent Section 5 and consideration of minority voting rights in redistricting. Jurisdictions, like Arizona, will not act or will not act in good faith, will delay action in legislative forums or before the Department of Justice until an "emergency" exists, or will create an "emergency" by blocking legislation. The result of allowing courts to continue sanctioning this circumvention by jurisdictions will be the statute's effective repeal.[7] The assault on the statute is already underway.

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[7] In fact similar situations to the Arizona legislative circumstance have arisen in Houston, Texas, with regard to city council elections where because of the jurisdiction's delay, a single judge court ordered the use of a plan subject to Section 5 objections, and a three judge court has refused to order new elections. *United States v. City of Houston*, Nos. 91-3076 and 91-3117 (S.D. Tex. Aug. 21, 1992). The Fifth Circuit has authorized single judge courts to order plans that have been objected to into effect where no precleared plan exists. *Campos v. City of Houston*, ___ F.2d ___, 1992 WL 180267 (5th Cir. 1992) (opinion on rehearing).

A three judge district court in Texas has recently declined to enjoin elections under a plan for county commissioner elections that is the subject of a Section 5 objection, and has in fact dismissed the Section 5 action with prejudice because of plaintiff's laches. *Lopez v. Hale County, Texas*, No. 5-92-CV-0078-C (N.D. Tex. Sept. 1, 1992) The court determined there is no

This frustration of the Voting Rights Act must stop now. It is not only contrary to public policy, it greatly offends public policy.

For the reasons stated, Appellants respectfully request this Court summarily reverse the district court order or, alternatively, note probable jurisdiction and hear this appeal on an expedited basis.

Dated: September 14, 1992

Respectfully submitted,

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Forum, et al.

"right" to remedy under Section 5 of the Voting Rights Act, and that the plaintiff bears the burden of calling the jurisdiction's attention to the fact that it has no preclearance before the electoral process begins. *Id.* Three other cases are pending against counties in the same area, all having similar facts, and similar rulings are expected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ARIZONANS FOR FAIR REPRESENTATION, et al., Plaintiffs, vs. J. FIFE SYMINGTON, et al., Defendants.	No. CIV 92-256-PHX-SMM **MEMORANDUM OF DECISION AND ORDER** (Filed June 19, 1992)

On February 7, 1992, Plaintiffs, Arizonans For Fair Representation, Inc., filed this action asking the Court to order state and congressional redistricting plans. On or about February 20, 1992, the Arizona Governor signed a state legislative redistricting plan passed by both houses of the state legislature. Laws 1992 (5th Special Session) Chapter 1, HB 2002 ("Bill 2002"). The state legislative plan was sent to the Department of Justice for pre-clearance. At the request of the parties, this Court stayed all action concerning the state legislative redistricting plan.

On June 10, 1992, the Department of Justice objected to a portion of Bill 2002. In particular, the Department of Justice found that dividing the Hispanic community in Santa Cruz County into three legislative districts minimized the Hispanic community's voting strength. The Department of Justice's letter states: "We are aware that alternative plans were rejected which would have avoided this fragmentation and more fairly recognized this concentration of Hispanic voters by dividing them

between two districts, thereby creating an additional district in the southern part of the state in which Hispanic voters would have the potential to elect representatives of their choice." (Pl's. Mot. to Lift Stay, Exh. A).

After receipt of the Department of Justice's objections, Plaintiffs, Arizonans for Fair Representation, filed a Motion for Temporary Lifting of Stay and for Emergency Interim Legislative Plan. June 17, 1992 was the date scheduled for the Plaintiffs' motion to lift the stay. Subsequent to Plaintiffs filing their motion to lift the stay, the Arizona State Legislature passed S.B. 1360, a legislative redistricting plan which attempted to cure the objections raised by the Department of Justice on June 10, 1992. The Governor signed S.B. 1360 on June 16, 1992, the same date it was passed by the legislature.

At the hearing on June 17, 1992, this court[1] heard arguments to determine if the stay in the legislative case should be lifted and interim use of S.B. 1360 should be ordered for the 1992 elections. The Court finds that interim use of S.B. 1360 is appropriate. Due to the upcoming elections and the complicated administrative procedures involved in Arizona's elections, exigent circumstances justify the interim use of S.B. 1360 for the 1992 state legislative elections.

Interim use of a plan is necessitated by the "proximity of a forthcoming election and the mechanics and complexities of the state's election laws." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *Terrazas v. Clements*, 537 F. Supp.

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[1] The three judge panel was reconvened for the purpose of the hearing.

514, 537 (N.D. Tex. 1982); *see also, Upham v. Seamon*, 456 U.S. 37, 43 (1982) (recognizing that district courts have authority to order or to permit elections to be held that "do not in all respects measure up to the legal requirements, even constitutional requirements."). As the Supreme Court in *Upham* acknowledged: "Necessity has been the motivating factor in these situations." *Upham*, 456 U.S. at 44. Arizona's primary election is September 8, 1992.

Arizona law has complicated and technical procedures which must be completed before the primary and general elections. For example, in order to determine the eligibility of candidates, boundary lines must be established. *See* A.R.S. § 16-314. The last day individuals may file their partisan candidate nominating petitions is June 25, 1992. *See* A.R.S. §§ 16-311, 16-314. All matters pertaining to candidate qualification must be resolved before ballots can be printed. *See* A.R.S. §§ 16-314, 16-351. July 2, 1992 is the last day for filing challenges to nomination petitions. *See* A.R.S. § 16-351. July 13, 1992 is the last day for Superior Court to hear and render decisions on petition challenges. *See* A.R.S. § 16-351. July 20, 1992 is the last day a party may file a notice of appeal to the Supreme Court. *See* A.R.S. § 16-351. July 21-31, 1992 is the period available for the Arizona Supreme Court to hear appeals and render decisions on petition challenges. *See* A.R.S. § 16-351. August 6, 1992 is the date on which absentee balloting begins. *See* A.R.S. § 16-545. By law, the absentee and regular ballots must be identical. A.R.S. § 16-545(A). Therefore, the ballots must be printed and available for absentee voting on August 6, 1992. *See* A.R.S. §§ 16-542, 16-545. Thus, Arizona's elections

involve numerous administrative tasks which must be completed prior to the primary and general elections. Given these deadlines and to avoid further delays which may disenfranchise or confuse voters, the Court chooses to order the interim use of S.B. 1360 for the 1992 state legislative elections.

The Court finds that ordering interim use of S.B. 1360 is preferable to all other options. First, the Court declines to order the use of the 1982 legislative redistricting plan. Since 1980, Arizona has undergone a 35% increase in population.[2] As a result, current district boundaries are seriously malapportioned. S.B. 1360 conforms with the constitutional requirement of population equality. Furthermore, the precinct boundaries have been redrawn so that they no longer conform to the 1982 legislative district.

Second, the Court refuses to delay the state legislative elections until a permanent plan has been precleared by the Department of Justice. Delaying the state legislative elections would be unfair to Arizona voters, increase voter confusion and increase the cost of the elections to the state. Continuing the current legislature until a permanent plan has been precleared is equally unacceptable. A significant number of state legislators have announced that they no longer wish to serve as legislators and will not seek re-election in 1992. A continuation of the current legislature would further confuse the voters and increase the cost of the elections.

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[2] Decennial Census of Population and Housing, 1990, Publ. L. 94-171 (1991).

Third, the Court finds that ordering at-large elections is inappropriate. There are ninety members of the Arizona Legislature. "[T]he prospect of electing 90 legislators at large was deemed so repugnant as to be justified only if the legislature's failure to enact a valid plan had been deliberate and inexcusable." *Ely v. Klahr*, 403 U.S. 108, 113 (1971). In the instant case, the legislature has enacted a plan. Courts should be sensitive to the goals of state policy. *Upham*, 456 U.S. at 43. "When fashioning a temporary plan, a district court should not preempt the legislative task nor 'intrude upon state policy any more than necessary.' " *Terrazas*, 537 F. Supp. at 528 (quoting, *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). Consequently, the Court holds that at-large elections are inappropriate due to the number of state legislative seats and the state's policy reflected in S.B. 1360.

S.B. 1360 reflects the state's policy and attempts to cure the objections raised by the Department of Justice. By adjusting Hispanic Majority precincts from District 9 to District 8, the three way division of the Hispanic population in Santa Cruz County is eliminated. As a result, two districts are created. The Department of Justice's letter of June 10, 1992 states that the Department would view two districts more favorably than the three districts originally proposed in Santa Cruz county. While this Court makes no determination on the constitutionality of S.B. 1360, or the validity of S.B. 1360 under the Voting Rights Act, the Court does find that interim use of S.B. 1360 is warranted given the forthcoming election and Arizona's complicated provisions necessary for administrating elections. *Upham*, 456 U.S. at 43; *Terrazas*, 537 F. Supp. at 514.

During the hearing, the Indian Intervenors and the Hispanic Intervenors raised objections to the interim use of S.B. 1360. The Indian Intervenors object to S.B. 1360 because it divides the Hopi Reservation located in the northern part of Arizona. The Hopis raised their concerns to the Department of Justice. However, the June 10, 1992 letter from the Department of Justice fails to mention any objection concerning the Hopi Reservation. During the hearing, Assistant Attorney General Lisa Hauser stated that the Department of Justice made inquiries regarding the Hopi Reservation, but no official objection has ever been made by the Department of Justice. While the Court is sensitive to the Hopi's concerns, the Court does not have sufficient evidence to decide this issue for ruling on the motion to lift the stay and order interim use of S.B. 1360. As previously stated, the Court makes no comment on the constitutionality of S.B. 1360 or its compliance with the Voting Rights Act.

The Hispanic Intervenors object to S.B. 1360 arguing that it does not cure the objections raised by the Department of Justice. The Hispanic Intervenors also dispute this Court's authority to order the interim use of S.B. 1360 for the 1992 statewide elections. As previously mentioned, the Court finds that it has authority to order interim use of S.B. 1360 for the 1992 legislative elections without preclearance by the Department of Justice. *Upham*, 456 U.S. at 43. As enacted, S.B. 1360 eliminates the three way division of the Hispanic community in Santa Cruz County. This modification attempts to address the overall objections raised by the Department of Justice. When considering the interim use of a plan, a district court must make "an appropriate conciliation between

the requirements of the Constitution and the goals of state policy. . . . " *Id.* While this Court makes no ruling on the constitutionality of S.B. 1360 or its validity under the Voting Rights Act, the Court does find that S.B. 1360 is an attempt to cure the objections raised by the Department of Justice. Given the current and immediate deadlines of the State of Arizona in carrying out the 1992 elections and the modifications passed by the legislature in response to the Department of Justice's objections, the Court overrules the Hispanic Intervenors' objections and orders interim use of S.B. 1360 only for the use of the 1992 state legislative elections. The Court does not adopt S.B. 1360 as the permanent plan and specifically refuses to comment on the constitutionality of S.B. 1360 or its compliance with the Voting Rights Act.

Last, the Court denies the motion to intervene filed by Robin Barker, Roy Mejia and Frank Mejia. The Court received this motion shortly before the hearing on the motion to lift the stay. Pursuant to Rule 24(a)(2), Federal Rule of Civil Procedure, a party may intervene as of right if that party (1) moves to do so in a timely fashion; (2) asserts an interest in the subject of the litigation; (3) shows that its interest would be impeded or impaired if the litigation goes forth without intervention; and (4) shows the interest is not adequately represented by the parties in the litigation. *Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1991).

If the proposed intervenor fails to establish criteria warranting intervention as a matter of right, a court may allow permissive intervention under Rule 24(b)(2). Permissive intervention is appropriate if the intervenor (1)

moves for intervention in a timely manner; (2) has questions of law or fact in common with the main case; and (3) shows and [sic] independent grounds for jurisdiction. *Id.*

The Court finds that the proposed intervenors' motion is untimely. The proposed intervenors have failed to show that their interests will not be adequately protected by the current parties to the lawsuit. Therefore, the Court denies intervention.

IT IS THEREFORE ORDERED that:

(1) The motion for a temporary lift of the stay in the legislative case is granted;

(2) the motion for emergency interim use of S.B. 1360 is granted for the 1992 state legislative elections. Both the primary and general state legislative elections of 1992 shall be conducted in accordance with S.B. 1360. State legislators elected pursuant to the interim use of S.B. 1360 shall serve for the full two-year term beginning in January, 1993;

(3) the Court authorizes emergency interim use of Laws 1992, Fifth Special Session, Chapter 2, that otherwise has not been precleared or previously ordered by the Court to be used for the 1992 elections;

(4) the Court authorizes interim use of any precinct boundary changes necessary to implement the interim use of S.B. 1360 for the 1992 primary general elections. The precinct and polling place changes still are subject to section 5 review by the Department of Justice even though the Court authorizes their emergency interim use. 28 C.F.R. § 51.18(b), (c);

(5) although preclearance by the Department of Justice is not required for the interim use of S.B. 1360 for the 1992 elections, the legislative parties are directed to submit S.B. 1360 to the Department of Justice for preclearance no later than July 31, 1992 for S.B. 1360's use in future elections;

(6) the stipulation to permit interim use of S.B. 1360 is denied because it was not signed by all parties to the lawsuit;

(7) the motion for intervention filed by Robin Barker, Roy Mejia and Frank Mejia is denied;

(8) Lisa Hauser, Assistant Arizona State Attorney General, served as special counsel to the Court on Arizona election laws and procedures for the purpose of implementing S.B. 1360 for the 1992 primary and general elections. As special advisor to the Court, Ms. Hauser is prohibited from discussing any aspect of her consultation with the Court. However, nothing in this order shall prevent Ms. Hauser from carrying out her respective duties or representation of her clients;

(8) the Court retains jurisdiction over the redistricting of the state legislative districts until further order of the Court.

DATED this 19th day of June, 1992.

/s/ Stephen M. McNamee
Stephen M. McNamee
United States District Judge

/s/ Alfredo C. Marquez
Alfredo C. Marquez
United States District Judge

/s/ Charles E. Wiggins
Charles E. Wiggins
United States Circuit Judge

Copies to all counsel of record

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ARIZONANS FOR FAIR REPRESENTATION, INC., an Arizona non-profit corporation; PAUL FANNIN; JOHN MAWHINNEY; STAN TURLEY;	§	No.: CIV 92-0256 PHX SMM
Plaintiffs,	§	
ED PASTOR,	§	NOTICE OF APPEAL (Filed July 15, 1992)
Plaintiff-Intervenor,	§	
v.	§	
J. FIFE SYMINGON, governor of the State of Arizona; RICHARD A. MAHONEY, Secretary of State of the State of Arizona; ARIZONA HOUSE OF REPRESENTATIVES; ARIZONA STATE SENATE;	§	
Defendants.	§	

Arizona Hispanic Community Forum, Plaintiff-Intervenors herein, hereby appeal, and give notice of their appeal, to the Supreme Court of the United States of the entirety of this Court's Order which was entered on June 19, 1992.

This appeal is taken pursuant to 28 U.S.C. §1253.

RESPECTFULLY SUBMITTED this 14th day of July, 1992.

DATED: July 14, 1992

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BY: /s/ Judith A. Sanders-Castro
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CERTIFICATE OF SERVICE

I certify that on this 14th day of July, 1992, I sent a copy of the foregoing document by U.S. mail, postage prepaid to each of the following:

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ARIZONANS FOR FAIR REPRESENTATION, INC., an Arizona non-profit corporation; PAUL FANNIN; JOHN MAWHINNEY; STAN TURLEY, Plaintiffs, ED PASTOR; HISPANIC CHAMBER OF COMMERCE INC., ARIZONA HISPANIC COMMUNITY FORUM, EDWARD VALENZUELA, RICHARD ZAZUETA, VALERIE ANN VIDAL, THE SAN CARLOS APACHE TRIBE, a Federally Recognized Indian Tribe, and RALEIGH THOMPSON, Chairman, and BURNETTE ROPE, Vice Chairman, and as Individual Tribal Members, VERNON MASAYESVA, Chairman, LORIS MINKLER and WAYNE	§	NO. CIV 92-0256 PHX SMM HISPANIC PLAINTIFFS/ INTERVENORS AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES (Filed July 20, 1992)

TAYLOR, JR., Individual Tribal Members of the Hopi Indian Tribe, a Federally Recognized Indian Tribe, THE TONTO APACHE TRIBE, a Federally Recognized Indian Tribe, LOUISE C. LOPEZ, Chairman, JERI JOHNSON, Vice Chairman, and as Individual Tribal Members, YAVAPAI-APACHE INDIAN COMMUNITY, CAMP VERDE RESERVATION, DAVID KWAIL, Chairman, STANLEY JACKSON, Vice Chairman, and as Individual Tribal Members, THE HAVASUPAI TRIBE, a Federally Recognized Indian Tribe, DON WATAHOMIGIE, Chairman, THOMAS SIYUJA, SR., Vice Chairman, and as Individual Tribal Members, THE COCOPAH INDIAN TRIBE, a Federally Recognized Indian Tribe, PETE SOTOS, Individual Tribal Member,

Plaintiffs/Intervenors,

VS.

J. FIFE SYMINGTON, Governor of the State of Arizona; RICHARD D. MAHONEY, Secretary of State of the State of Arizona; ARIZONA STATE HOUSE OF REPRESENTATIVES; ARIZONA STATE SENATE;

Defendants.

Arizona Hispanic Community Forum, Plaintiff-Intervenors herein, hereby appeal, and give notice of their appeal, to the Supreme Court of the United States of the entirety of this Court's Order which was entered on June 19, 1992.

This appeal is taken pursuant to 28 U.S.C. §1253.

RESPECTFULLY SUBMITTED this 17th day of July, 1992.

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CERTIFICATE OF SERVICE

I certify that on July 17, 1992, I sent a copy of the Hispanic Plaintiffs/Intervenors Amended Notice of Appeal to each of the following:

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JUDITH A. SANDERS-CASTRO

[SEAL]

U.S. Department of Justice
Civil Rights Division

Washington, D.C. 20530

Office of the Assistant Attorney General

JUN 10 1992

Lisa T. Hauser, Esq.
Assistant Attorney General
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Phoenix, Arizona 85007

Dear Ms. Hauser:

This refers to the 1992 redistricting for the Senate and the House of Representatives for the State of Arizona, and Chapter 2, sections 1 and 2 (1992), which amends statutory deadlines to designate county voting precinct boundaries, reclassify voter registration according to the new precincts, and count registered voters by precinct following the 1992 redistricting for the House and Senate, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received responses to our request for additional information on April 21, May 8, May 15, May 20, and May 21, 1992; supplemental information was received on June 5, 1992.

We have carefully considered the information the state has provided, as well as Census data and information and comments from other interested persons. As it applies to the redistricting process, the Voting Rights Act requires that the Attorney General determine whether the

submitting authority has sustained its burden of showing that the proposed plan is free of the proscribed discriminatory purpose or effect. In addition, the submitted plan may not be precleared if its implementation would result in a clear violation of Section 2 of the Act. In the case of a statewide redistricting such as the instant one, this examination requires us not only to review the overall impact of the plan on minority voters, but also to understand the reasons for and the impact of each of the legislative choices that were made in arriving at this particular plan.

In making these judgments, we apply the legal rules and precedents established by the federal courts and our published administrative guidelines. See, e.g., 28 C.F.R. 51.52 (a), 51.55, 51.56. For example, we cannot preclear those portions of a plan where the legislature has deferred to the interests of incumbents while refusing to accommodate the community interests shared by insular minorities. See, e.g. *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1992); *Ketchum v. Byrne*, 740 F.2d 1398, 1408-09 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). Such concerns are frequently related to the unnecessary fragmentation of minority communities. See 28 C.F.R. 51.59. We endeavor to evaluate these issues in the context of the demographic changes which compelled the particular jurisdiction's need to redistrict (*id.*). Finally, our entire review is guided by the principle that the Act ensures fair election opportunities and does not require that any jurisdiction attempt to guarantee racial or ethnic proportional results.

With these considerations in mind, we have reviewed the legislative choices made by the State of Arizona. Demographic changes in the state during the past decade

have resulted in an overall population increase. Among minority groups, the Hispanic growth has been the most significant. The Hispanic population has grown at a rate of 56 percent, and there has been a 2.6 percentage point increase (from 16.2 to 18.8) in the Hispanic proportion of the total population from 1980 to 1990. Our analysis shows that, in large part, the Arizona House and Senate redistricting plan meets Section 5 preclearance requirements.

In the southeastern area of the state, however, the proposed configuration of district boundary lines appears to have been drawn in such a way as to minimize Hispanic voting strength. Specifically, we refer to the considerable concentration of Hispanic population in Santa Cruz County (78% Hispanic in population), which the submitted plan divides among three legislative districts (Districts 8, 9 and 11). We are aware that alternative plans were rejected which would have avoided this fragmentation and more fairly recognized this concentration of Hispanic voters by dividing them between two districts, thereby creating an additional district in the southern part of the state in which Hispanic voters would have the potential to elect representatives of their choice. Insufficient nonracial explanations have been advanced for this unnecessary fragmentation. While we have noted the state's explanation that the proposed districting in this area was designed to accommodate the interests of certain white incumbents, and even though incumbency protection is not in and of itself an inappropriate consideration, it may not be accomplished at the expense of minority voting potential. *Garza v. County of Los Angeles*, 918 F.2d at 771; *Ketchum v. Byrne*, 740 F.2d at 1408-09.

Therefore, in light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance. Accordingly on behalf of the Attorney General, I must object to the 1992 redistricting plan for the Arizona State Senate and House of Representatives to the extent that it incorporates the proposed configurations for the area discussed above.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed 1992 Senate and House redistricting plan has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the 1992 redistricting plan for the Senate and House of Representatives continues to be legally unenforceable. *Clark v. Roemer,* 111 S. Ct. 2096 (1992); *South Carolina v. United States,* 585 F. Supp. 418 (D.D.C. 1984); 28 C.F.R. 51.10 and 51.45.

The remaining specified changes occasioned by Chapter 2 (1992) are directly related to the proposed 1992 Senate and House redistricting plan. Therefore, the Attorney General is unable to make any determination at this time with regard to the proposed amendments to statutory deadlines. See 28 C.F.R. 51.22(b) and 51.35.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State

of Arizona plans to take concerning this matter. In this regard, the Department stands ready to review any plan the legislature might adopt to remedy this objection on an expedited basis. If you have any questions, you should call Rebecca Wertz (202-514-6342), Deputy Chief of the Voting Section.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

ATTACHMENT No. 1

[SEAL]

U.S. Department of Justice
Civil Rights Division

Washington, D.C. 20530

Offices of the Assistant Attorney General

AUG 12 1992

Lisa T. Hauser, Esq.
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007

Dear Ms. Hauser:

This refers to Chapter 240 (S.B. 1360) of the Second Regular Session (1992), which provides for a modified redistricting plan for the Senate and the House of Representatives for the State of Arizona, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on July 23, 1992; supplemental information was received on August 10 and 11, 1992.

We have carefully analyzed the proposed changes and the information you have provided, as well as Census data and information and comments from other interested persons. We are mindful that the voting changes you have submitted for Section 5 review are intended to remedy the concerns expressed in our June 10, 1992, objection to the proposed legislative redistricting plan for the Arizona House and Senate.

As we noted in our objection letter, two concerns prompted our conclusion that the state had failed to meet its burden of showing that the plan was not motivated, in part, by a purpose of diluting minority voting strength in southern Arizona. First, we noted that the submitted plan divided a Hispanic concentration in Santa Cruz County among three legislative districts (Districts 8, 9 and 11). Second, we noted that the state had not adequately explained the rejection of alternative plans that avoided the identified fragmentation and created three districts in the southern part of the state in which Hispanic voters would have the potential to elect representatives of their choice instead of the two districts in the submitted plan.

Analysis of the plan now under review reveals that while the state appears to have addressed the fragmentation of Hispanics in Santa Cruz County, the state only increases the Hispanic share of the population in proposed District 8 by less than three percentage points (from 34.7% to 37.4%). We are aware that following the objection, minority leaders urged the state to remedy the noted fragmentation and create an additional district in southern Arizona in which minorities would comprise a majority of the population. We are also aware that there were alternative plans for this area of the state available to the legislature that would both cure the noted fragmentation and afford minorities an opportunity to elect candidates of their choice by incorporating those Hispanic areas into another district which has a minority population majority. Our analysis of the various alternatives suggests that the state's reasons for rejecting the alternative approaches are pretextual. Rather, it appears that the state has again elevated incumbency-protection

considerations above the fair recognition of minority voting strength in this area.

Therefore, in light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance. Accordingly, on behalf of the Attorney General, I must object to the proposed redistricting plan (Chapter 240 (S.B. 1360)) for the Arizona Senate and House of Representatives.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed Senate and House redistricting plan has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the 1992 redistricting plan for the Senate and House of Representatives continues to be legally unenforceable. *Clark v. Roemer,* 59 U.S.L.W. 4583 (U.S. June 3, 1992); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Arizona plans to take concerning this matter. In this regard, the Department stands ready to review any plan the legislature might adopt to remedy this objection on an expedited basis. If you have any questions, you should

call Rebecca Wertz (202-514-6342), Deputy Chief for Litigation in the Voting Section.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division